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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION This Document Relates to: ALL ACTIONS	MDL Docket No. 14-md-02541-CW
MARTIN JENKINS, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	Case No. 14-cv-02758-CW **DEFENDANTS' OPPOSITION TO PLAINTIFFS' AMENDED JOINT MOTION FOR CLASS CERTIFICATION** Date: July 23, 2015 Time: 2:00 p.m. Courtroom: Courtroom 2, 4th Floor Before: Hon. Claudia Wilken

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Preliminary Statement

Defendants National Collegiate Athletic Association ("NCAA") and eleven Division I conferences submit that class certification should be denied for one simple and fundamental reason: the named plaintiffs seek relief that would benefit them but would *harm* many of the absent putative class members they purport to represent. In these circumstances, the named plaintiffs simply cannot fairly and adequately protect the interests of the absent class members, as required by Fed. R. Civ. P. 23(a)(4), and injunctive relief respecting the class as a whole plainly is not appropriate, as required by Fed. R. Civ. P. 23(b)(2).

This point is not fairly debatable. The named plaintiffs seek an injunction that would allow unlimited compensation for Football Bowl Subdivision ("FBS") football players and Division I men's and women's basketball players. This requested relief would be sure to produce vigorous recruitment of and substantial payments to the most talented athletes—a group that allegedly includes the named plaintiffs themselves, each of whom is described in his or her complaint as having been a high school star. But there can be no doubt that the requested injunction *also* would lead to the *reduction* or *elimination* of scholarships and athletic opportunities for many of the thousands of less renowned student-athletes whom the named plaintiffs claim to represent as unnamed class members, and who would suffer as resources are funneled to the athletic superstars.

The reality that some absent class members are benefited by the challenged NCAA rules and would be injured by the requested injunctive relief makes class certification impermissible. None of the decisions on which plaintiffs rely in support of their request for certification, notably including this Court's decision in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. C 09-CV-1967 CW, 2013 WL 5979327 (N.D. Cal. Nov. 8, 2013) ("*O'Bannon*"), involved a circumstance where the absent class members would have been harmed by award of the requested relief; indeed, in *In re NCAA I-A Walk-On Football Players Litigation*, No. C 04-1254 C, 2006 WL 1207915 (W.D. Wash. May 3, 2006), on which plaintiffs here rely, the court denied class certification precisely because the inherently conflicting interests of putative class members would have required the named plaintiffs to undercut the interests of absent class members. We are not aware

of *any* decision that has ever certified a class in the face of such manifestly conflicting intra-class interests. This case, we respectfully submit, should not be the first.

Statement of Facts

The NCAA's mission is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." (NCAA Constitution art. 1.3.1.[1]) "Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport." (Division I Bylaw 12.01.1.) The NCAA's eligibility rules both (i) preserve the amateur student-athlete collegiate model and (ii) encourage colleges and universities to spread their athletics-based financial aid among a large number of student-athletes, rather than concentrate those funds on the recruitment of a handful of superstar players. These rules ensure that more student-athletes are able to afford a college education and to participate in broad sports programs, including many non-revenue sports.

Invoking the Sherman Act, plaintiffs challenge the NCAA and conference rules that limit athletics-based financial aid to educational expenses and prohibit payments above the cost of attendance based on athletic skill or performance.[2] In their complaint, plaintiffs Martin Jenkins, Nigel Hayes, and Alec James challenge all NCAA and conference rules that "prohibit, cap, or otherwise limit the remuneration that players in each of [the alleged] markets may receive for their athletic services." (JAC ¶ 38.)[3] In the consolidated amended complaint, the remaining plaintiffs

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[1] A copy of the relevant provisions of the NCAA Constitution and Division I Bylaws is attached as Exhibits 2, 3 and 4, respectively, of the Declaration of Jeffrey A. Mishkin in Support of Defendants' Opposition to Plaintiffs' Amended Joint Motion for Class Certification, submitted herewith.

[2] Several named plaintiffs [redacted] (*See, e.g.*, Jenkins Dep. at 113; Hayes Dep. at 10-11, 201; Hartman Dep. at 225.) A copy of the relevant excerpts from the transcripts of the depositions of plaintiffs Nigel Hayes, Alec James, Martin Jenkins, Justine Hartman and John Bohannon is attached as Exhibits 5, 6, 7, 8 and 9, respectively, of the Declaration of Jeffrey A. Mishkin in Support of Defendants' Opposition to Plaintiffs' Amended Joint Motion for Class Certification, submitted herewith.

[3] Five conferences—the Pac-12 Conference, The Big Ten Conference, Inc., the Big 12 Conference, Inc., the Southeastern Conference, and the Atlantic Coast Conference—are named as defendants in *(cont'd)*

"specifically challenge" the application of Division I Bylaw 15.1 to the institutions that participate in FBS football and Division-I men's and women's basketball. (CAC ¶¶ 1, 297.)[4] Bylaw 15.1 provides that a student-athlete "shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance." (Division I Bylaw 15.1.)

In seeking to prohibit the NCAA and its member conferences from applying any limitations on the amount of financial aid that student-athletes may receive, the *Jenkins* plaintiffs assert that the challenged rules have deprived putative class members "of the ability to receive market value for their services as college football and men's basketball players in a free and open market." (JAC ¶ 123.) Likewise, the CAC plaintiffs assert that the rules "arbitrarily restrict[ ] athletics financial aid to amounts that are less than the athletes would receive in a competitive market." (CAC ¶ 15.)

The three *Jenkins* plaintiffs and two CAC plaintiffs[5] now move to certify five differently defined putative injunctive relief classes consisting of current and former FBS football players, Division I men's basketball players and Division I women's basketball players. (Pl. Br. at 11-14.)[6]

For the reasons explained below, certification of these classes is inappropriate. None of the proposed representative plaintiffs has established that he or she can fairly and adequately protect the interests of absent putative class members or that the requested injunctive relief is appropriate

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the *Jenkins* complaint. (*Jenkins* Second Amended Complaint, No. 4:14-cv-2758 (Feb. 13, 2015) ("JAC") ¶ 22.)

[4] Those conferences named in the *Jenkins* complaint plus six additional conferences—the American Athletic Conference, Conference USA, Inc., the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, and the Western Athletic Conference—are named as defendants in the consolidated amended complaint. (Consolidated Amended Complaint, No. 4:14-md-2541 (July 11, 2014) ("CAC") ¶¶ 146-82.)

[5] In their amended joint motion, CAC plaintiffs proffered four putative class representatives, but withdrew two of those representatives during discovery.

[6] The CAC plaintiffs also seek past damages, but that relief is not at issue on this motion. The CAC plaintiffs apparently intend separately to move for certification of several damages classes under Rule 23(b)(3), but have not yet done so. In addition, the CAC plaintiffs assert a claim for violation of California's Unfair Competition Act (CAC ¶¶ 545-549), but the joint motion does not seek to certify a Rule 23(b)(2) class to pursue that claim. (*See* Consolidated Plaintiffs' and *Jenkins* Plaintiffs' Amended Joint Motion for Class Certification (Feb. 20, 2015) (Dkt. No. 200) ("Pl. Br.") at 11.)

respecting the classes as a whole. In addition, three of the five moving plaintiffs—Mr. Jenkins and the two CAC plaintiffs—[redacted] (Jenkins Dep. at 98, 116; Hartman Dep. at 246; Bohannon Dep. at 8, 22; Pl. Br. at 12-14), leaving no representative whatsoever to pursue injunctive relief against the six conference defendants that are named only in the consolidated amended complaint.[7]

Argument

I. PLAINTIFFS HAVE MADE NO EFFORT TO ESTABLISH THAT THEY MEET THE REQUIREMENTS OF RULE 23.

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (citation omitted). To justify departing from that rule, the named plaintiff "must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* (citation omitted). "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Id.*

The standards that govern class certification are well settled. Under Rule 23(a), the party seeking certification must demonstrate that: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." *Id.* at 2548. These are "threshold requirements applicable to all class actions." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). In addition, a plaintiff seeking certification under Rule 23(b)(2) must establish that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

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[7] As noted above, six defendants—the American Athletic Conference, Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, and the Western Athletic Conference—are named as defendants only in the consolidated amended complaint. (CAC ¶¶ 169-82.) They have not been named as defendants in the *Jenkins* complaint, which is the only complaint with a plaintiff with standing to seek injunctive relief. Consequently, an injunctive class cannot be certified with respect to these six conferences under any circumstances.

It is fundamental that plaintiffs bear the burden of *proving* that they have met the requirements of Rule 23. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. Thus, as the Supreme Court has repeatedly held, the district court must "probe behind the pleadings before coming to rest on the certification question" and must determine, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 160-61 (1982)). "[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable." *Falcon*, 457 U.S. at 160; *see also Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) ("Adequacy [of representation under Rule 23(a)] is for the plaintiffs to demonstrate; it is not up to defendants to disprove.").

Plaintiffs in this case have offered *no* evidence in support of their motion and have made no effort to prove *in fact* that the requirements of Rule 23 have been met. Instead, they merely rely on the conclusory allegations in their complaints and this Court's class certification decision in *O'Bannon*. The entirety of their support for the adequacy of their representation consists of two passages in their brief: "As for adequacy, these representatives will adequately represent the interests of their respective class because, among other reasons, there are no internal conflicts with each class and each representative has indicated his or her willingness to diligently represent the interests of his or her respective class." (Pl. Br. at 3.) "The named Plaintiffs are adequate representatives of each of their respective proposed classes. Their interests are aligned with all class members in challenging the lawfulness of the restraints that impose bans on the compensation they can receive from schools or conferences for their athletic services apart from the GIA. They can be trusted to protect the interests of those class members who are not present and prosecute the action vigorously on their behalf." (*Id.* at 21.)

These assertions fall far short of meeting the burden that Rule 23 imposes on plaintiffs. Plaintiffs appear to assume that all FBS football players and men's and women's basketball players would receive more money if the challenged rules were eliminated, and thus would benefit from the injunctive relief that plaintiffs seek. Plaintiffs also assume—and ask this Court to assume—

that each and every Division I institution has the resources necessary to meet the increased costs that would result from the elimination of the challenged rules without reducing the number of scholarships it offers. But plaintiffs proffer neither factual nor economic evidence to support those assumptions, and without such evidence, plaintiffs cannot prevail on this motion.[8]

Plaintiffs' reliance on *O'Bannon* does not make up for their lack of evidence. In *O'Bannon*, this Court certified a Rule 23(b)(2) injunctive class only after concluding that an intra-class conflict did not exist for the unique reason (not present here) that the group license sought in *O'Bannon* would not cause class members to compete against one another for compensation. Specifically, the injunctive relief sought in *O'Bannon* was, by definition, equally beneficial to each and every putative class member: "Plaintiffs' model propose[d] that damages be allocated equally among the members of every football and basketball team" according to a "group licensing" scheme, notwithstanding that, in a free market, "some putative class members—such as star athletes—would command a higher price for their name, image, and likeness rights than others." 2013 WL 5979327, at *5-6 (emphasis added). "This distinction is important," the Court explained, "because it renders irrelevant any differences in the value of each class member's individual publicity rights." *Id.* at *6. Thus, each member of the injunctive class in *O'Bannon* had an identical interest in obtaining the requested injunctive relief.

The injunction that plaintiffs seek in this case is markedly different from the injunction sought in *O'Bannon*. Unlike the injunctive class members in *O'Bannon*, who had identical interests in obtaining the requested injunctive relief, the putative class members in this case have different and conflicting interests in retaining or eliminating the challenged eligibility rules. The requested injunction here will cause student-athletes to compete against one another for compensation and, depending on the differences in the value of each class member's individual talent and skill, some putative class members will be harmed by the elimination of the challenged rules.

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[8] Nor may plaintiffs simply rely on expert testimony provided in other cases, such as *O'Bannon*, to which the defendant conferences were not parties. Local Rule 7-5(a) makes clear that a moving party's factual contentions must be supported by affidavits or declarations submitted in connection with the motion.

Plaintiffs simply assume that, in a "free and open" labor market in which student-athletes individually negotiate for the amount of their compensation, all FBS football players and Division I men's and women's basketball players will receive more financial aid than they do now. But in their deposition testimony, the named plaintiffs [redacted] (*See, e.g.*, James Dep. at 291-92; Hartman Dep. at 246.)

Plaintiffs do not address this adverse effect anywhere in their motion papers. They assert that they and "other *similarly situated* current and future Division I college football and men's and women's basketball players" would benefit from the injunction they seek and that, "if total compensation was not capped, schools would compete for the *best* recruits by offering them compensation outside of the GIA, exceeding the cost of attendance." (Pl. Br. at 6, 8 (emphasis added).) These assertions beg the question, however, whether the named plaintiffs can fairly and adequately protect the interests of those putative class members who are not "similarly situated" to "the best recruits" and would be harmed by the proposed injunction. The named plaintiffs have not demonstrated that they can fairly and adequately protect the interests of *those* putative class members.

Having failed to make even the slightest effort to prove that they can fairly and adequately protect the interests of all absent class members, as required by Rule 23(a)(4), or that the injunction they seek is appropriate for the classes as a whole, as mandated by Rule 23(b)(2), plaintiffs cannot prevail on their motion for class certification.

II. CONFLICTS AMONG PUTATIVE CLASS MEMBERS PRECLUDE THE NAMED PLAINTIFFS FROM FAIRLY AND ADEQUATELY PROTECTING THE INTERESTS OF ALL ABSENT CLASS MEMBERS.

Even if plaintiffs had made some attempt to meet the requirements of Rule 23, that effort could not have succeeded. The record evidence, including the deposition testimony of the named plaintiffs and the economic evidence submitted by defendants, demonstrates that conflicts among putative class members render it impossible for the proposed representative plaintiffs—or indeed any student-athlete—to fairly and adequately protect the interests of all members of the proposed classes. While some putative class members might receive compensation in addition to—and per-

haps significantly in excess of—their current athletic scholarships if the proposed injunction were granted, many putative class members would receive less financial aid than they currently receive, and perhaps no aid at all. This conflict of interest between those putative class members who would benefit from the elimination of the challenged rules and those who benefit from the continuation of those same rules precludes class certification.

Rule 23(a)(4) is designed "to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625; *see also Mateo v. V.F. Corp.*, No. C 08-05313 CW, 2009 WL 3561539, at *5 (N.D. Cal. Oct. 27, 2009) (Wilken, J.) (adequacy criterion requires courts to determine whether "the named plaintiffs . . . have any conflicts of interest with other class members" (citation omitted)). "[A] class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class." *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000); *see also Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (conflicts render plaintiffs inadequate class representatives where "there were undoubtedly people among the broad class proposed . . . who did not oppose the [challenged policies], and who, in fact, approved of it and wished the policies fully enforced"); *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988) (affirming denial of class certification because some class members would "undoubtedly derive great benefit" from maintenance of the status quo). The existence of conflicts among class members "is a matter of particular concern in a case such as this one [seeking] certification under Federal Rule of Civil Procedure 23(b)(2) which does not allow class members to opt out of the class action." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993). Where, as here, "some plaintiffs claim to have been harmed by the same conduct that benefited other members of the class," "the named representatives [cannot] 'vigorously prosecut[e] the interests of the class,'" and class certification must be denied. *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Grp. L.P.*, 247 F.R.D. 156, 177 (C.D. Cal. 2007) (citation omitted).

Conflicts of interest among class members led the court in the *Walk-On* litigation to deny class certification after finding that the proposed class representatives could not adequately protect the interests of absent class members. 2006 WL 1207915, at *8-9. That case involved a challenge

to the NCAA's limit on the number of grant-in-aid scholarships that each school could award; the plaintiffs were walk-on players who were effectively precluded from receiving scholarships under that rule. *See id.* at *1. In resisting class certification, the NCAA noted that each class member would have to prove that "he (and not other teammates) actually would have been awarded [a walk-on] scholarship[]" and "that players from other schools would not have been preferred over him for one of his school's [additional] scholarships." *Id.* at *7. This, the NCAA argued, created a conflict of interest among the members of the class. *Id.* The court agreed, finding that one class member's success in proving that he would have received a scholarship in the absence of the challenged bylaws would necessarily come at the expense of all the other class members. *Id.* at *8-9.

Similar conflicts are inherent in this case. As explained below, several independent economic effects of the requested injunction ensure that many putative class members who currently benefit from the challenged eligibility rules would be financially harmed if the named plaintiffs succeed in enjoining the application of those rules. First, the substitution effect, which this Court recognized in *O'Bannon*, would cause many current student-athletes to be displaced by other student-athletes, and thereby to lose their athletic scholarships. Second, the economics of superstars would skew compensation in a "free and open" labor marketplace so that only superstar student-athletes would likely earn substantial compensation, while many putative class members would receive little or no financial aid. Coupled with findings (i) that the value of the athletics-based financial aid that many student-athletes receive exceeds the value of their contribution to their teams' revenue generation and (ii) that talented walk-on athletes are willing and able to play FBS football and Division I basketball with no financial aid whatsoever, the economics of superstars leads to the conclusion that many putative class members would lose some or all of their current athletic scholarships if the challenged rules were struck down.

A. The Substitution Effect Prevents Certification In These Actions.

The evidence establishes that, if the challenged rules were eliminated, some student-athletes would displace putative class members by choosing schools that offer higher compensation, remaining in college longer, or playing FBS football or Division I basketball when they otherwise would not have done so. Plaintiff Jenkins, for instance, testified that he was sure that his team-

mates who left Clemson early to play professional football would have stayed at Clemson longer if they had been paid to play college football. (Jenkins Dep. at 244.) Plaintiff James likewise testified [redacted] (James Dep. at 281-83.) Similarly, plaintiff Bohannon, who currently plays in the National Basketball Association Development League, [redacted] (Bohannon Dep. at 182.) And several of the proposed representative plaintiffs [redacted] (Hayes Dep. at 60-61, 198-99; Jenkins Dep. at 100; Hartman Dep. at 83-86; Bohannon Dep. at 180-82.) Necessarily, if players were to make such decisions in response to the grant of the injunction the named plaintiffs seek, they would displace other putative class members.

In *O'Bannon*, this Court recognized this substitution effect and acknowledged that, if the NCAA eligibility rules were changed, some student-athletes would be displaced. 2013 WL 5979327, at *8-9. This Court found that some putative class members would be harmed by the elimination of the existing rules if, as a result, those class members were displaced by other student-athletes. *Id.* Although the Court discussed the substitution effect in the context of its denial of class certification under Rule 23(b)(3), the same displacement effect would occur if injunctive relief were granted under Rule 23(b)(2), and the same harm to displaced class members would result.

This Court also recognized in *O'Bannon* that, "without the ban on student-athlete pay, competition among Division I schools for student-athletes would increase substantially. That increased competition for student-athletes, combined with the potentially higher costs of recruiting and retaining those student-athletes, would have likely driven some schools into less competitive divisions, thereby insulating entire teams from the specific harms that Plaintiffs allege in this suit." *Id.* at *9. Plaintiffs here, like the plaintiffs in *O'Bannon*, "have not provided a feasible method for determining which members of the [putative classes] would still have played for Division I teams—and, thus, suffered the injuries alleged here—in the absence of the challenged restraints." *Id.*

In the instant case, if the requested injunctive relief were granted, the substitution effect would cause displacement of putative class members for several reasons. Consistent with this Court's findings in *O'Bannon*, defendants' economics expert, Dr. Janusz A. Ordover, has determined that many scholarship student-athletes choose to leave their team before exhausting their eligibility, often to play professional football or basketball, thus making available to another player an athletic scholarship that would not otherwise be open. (Ordover Rep.[9] ¶¶ 21-23.) Dr. Ordover concluded that, applying economic principles and assuming that plaintiffs prevail in their effort to eliminate the challenged rules, many of those student-athletes who now leave college to play professional football or basketball would, if they were paid to play college sports, stay in school longer, thereby displacing other putative class members. (*Id.* ¶¶ 24-28.) He further concluded that many student-athletes who transfer out of schools with FBS football or Division I basketball programs would likely have remained enrolled at their FBS football or Division I basketball schools if they were paid to play college sports. (*Id.* ¶¶ 29-31.)

Dr. Ordover also found that many new players would compete for a scholarship to play FBS football or Division I basketball if there were no limits on the level of player compensation. (*Id.* ¶ 32.) These players currently opt not to attend college at all or to attend a school without an FBS football or Division I basketball program. Some of these new players currently play at non-FBS or non-Division I schools or in foreign professional leagues. (*Id.* ¶¶ 33-44.) Dr. Ordover concluded that these new players would displace putative class members who presently receive athletics-based scholarships. (*Id.*)

In sum, the substitution effect, which the plaintiffs and this Court acknowledged in *O'Bannon*, would cause numerous putative class members to be displaced and to lose their athletic scholarships. These putative class members would be harmed by the injunctive relief that plaintiffs

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[9] Expert Report of Janusz A. Ordover, Ph.D., dated April 30, 2015 ("Ordover Rep."). A copy of the Ordover Report is attached as Exhibit 1 of the Declaration of Jeffrey A. Mishkin in Support of Defendants' Opposition to Plaintiffs' Amended Joint Motion for Class Certification, submitted herewith.

seek. Accordingly, the named plaintiffs cannot fairly and adequately protect the interests of those putative class members.

B. The Economics Of Superstars Dictates That Many Putative Class Members Would Be Harmed By The Requested Relief.

Some putative class members who would not be displaced by others as a result of the requested injunction would nevertheless be injured if the requested relief were granted. As Dr. Ordover has explained, the economics of superstars would result in the payment of compensation to student-athletes according to the value of their contribution to their team's revenue generation. This tying of compensation to contribution would result in skewed compensation levels, with superstar athletes being paid substantially more than less talented players, and many players being paid less than they currently receive in financial aid. The economics of superstars describes the phenomenon, observed in many fields and especially in professional sports and the arts, of compensation being paid disproportionately to the most talented or most valuable participants, with many other participants paid at a relative minimum compensation level. (Ordover Rep. ¶¶ 45-48.) Currently, the challenged rules prevent any payments to FBS football players and Division I basketball players above the cost of attendance, and thus the economics of superstars does not now affect putative class members. But the analysis of several proxies, including Football Championship Subdivision football scholarship levels, student-athlete recruitment data, and the salaries of professional football and basketball players, makes it clear that, in a "free and open" marketplace in which schools pay student-athletes based on performance, the economics of superstars would drive the payments to superstar student-athletes up and the payments to less talented student-athletes down to a "minimum" level—which, in college sports, would be zero, given the availability and willingness of walk-on players to play without scholarships or other remuneration. (*Id.* ¶¶ 49-68.)

Consequently, while the elimination of the current eligibility rules would likely cause superstar players to receive substantial compensation, many putative class members who presently receive more in financial aid than the value of their contribution to their team's revenue generation would lose some or all of their athletic scholarships. And because plaintiffs cannot advocate for

some artificial minimum payment—a proposition that would be antithetical to the "free and open" marketplace they espouse—the minimum level of compensation would be set by the ready availability and willingness of talented walk-on players who are prepared and able to play FBS football or Division I basketball without any compensation whatsoever. Several of the named plaintiffs testified [redacted] (*See, e.g.*, Hayes Dep. at 157-64; James Dep. at 218-21; Jenkins Dep. at 260-64; Bohannon Dep. at 169.) In an openly competitive marketplace, those student-athletes prepared to offer their services for free would set the minimum compensation level for all student-athletes.

Dr. Ordover's analysis is consistent with that of several economists who traditionally have supported greater compensation for student-athletes, including Dr. Noll, plaintiffs' expert in *O'Bannon*. (*Id.* ¶¶ 69-73.) These experts have concluded that as many as 40% of Division I men's basketball players, for instance, receive athletics-based financial aid that exceeds the value of their contribution to their team's revenue generation. In a "free and open" marketplace, in which remuneration is based on value to the team's revenue generation, those student-athletes—all of them putative class members in these actions—would lose some or all of their current financial aid.

In this regard, plaintiffs' reliance on the class certification decision in *White v. NCAA*, No. CV 06-0999-RGK, 2006 WL 8066803 (C.D. Cal. Oct. 19, 2006), is misplaced. (*See* Pl. Br. at 16, 19-20.) Unlike plaintiffs here, the plaintiffs in *White* did not seek an injunction to permit a "free and open" marketplace for student-athlete compensation, but asked only to certify a damages class to recover the difference between the maximum allowable level of grant-in-aid and the cost of attendance. 2006 WL 8066803, at *1. Certification in *White* therefore did not implicate the economics of superstars that arises in the completely unfettered free market that plaintiffs seek here. Moreover, the court in *White* expressly granted the NCAA leave to move for decertification at the conclusion of discovery, and the NCAA so moved, but the parties settled before the court issued a decision on decertification. *Id.* at *6.

In sum, if the injunctive relief that plaintiffs seek were granted, the economics of superstars would harm the many putative class members who would lose some or all of their current athletic scholarships as schools concentrated their resources on compensating superstars. Less talented or

less valuable student-athletes would be compensated in amounts equal to the value of their contribution to their team's revenue generation, but, in many instances, that compensation would be less than the athletics-based financial aid that those putative class members currently receive. In these circumstances, neither the named plaintiffs nor any other group of representative plaintiffs can fairly and adequately protect the interests of all absent putative class members.

C. Plaintiffs Offer No Support For Their Assertion That All Putative Class Members Would Receive Higher Compensation If The Requested Injunctive Relief Were Granted.

The substitution effect and the economics of superstars are two expected and independent economic effects of the relief that plaintiffs seek, yet plaintiffs do not address either effect. Instead, plaintiffs assert, with no factual or economic proof whatsoever, that compensation to all putative class members would be higher in the absence of the challenged rules. (Pl. Br. at 7-8.) Plaintiffs simply want this Court to believe, based on plaintiffs' bald assertion that all Division I schools are "[f]lush with cash" (JAC ¶ 85), that, in a "free and open" marketplace, all 351 Division I institutions would provide athletic scholarships and other compensation to all putative class members at levels at least equal to their current athletic scholarships.

There is not a shred of evidence to support such a belief. Indeed, the facts contradict it. Most Division I institutions face serious financial constraints and, if plaintiffs succeed in eliminating the challenged rules, those constraints would likely lead many—if not most—Division I institutions to reduce athletic scholarships for some putative class members even as some institutions increase scholarships for others. Plaintiffs proffer no evidence—as is their burden on this motion—that all Division I schools would, or even financially could, continue to offer full scholarships to all putative class members if the requested injunction were granted.

Most Division I athletics departments operate at a financial deficit. College athletics programs generally produce less revenue than they require to operate. (Ordover Rep. ¶¶ 75-86.) Even when examined separately, most FBS football programs, most Division I men's basketball programs and all Division I women's basketball programs operate at deficits. (*Id.*) The requested injunction would exacerbate these deficits, intensify the bidding wars for the most talented student-athletes and likely cause some schools to reevaluate the wisdom of continuing to offer FBS football

or Division I basketball programs. As this Court acknowledged in *O'Bannon*, "increased competition for student-athletes, combined with the potentially higher costs of recruiting and retaining those student-athletes, would . . . likely drive[ ] some schools into less competitive divisions," 2013 WL 5979327, at *9, where hundreds (or even thousands) of putative class members would not receive the financial aid they currently receive.

In fact, even under the existing rules limiting financial aid to the cost of attendance, many schools have begun to evaluate whether they can afford to continue to offer such athletic programs, especially the extremely expensive FBS football. (Ordover Rep. ¶¶ 90-92.) For example, in August 2014, the athletic director of the University of Hawaii (an FBS school in the Mountain West Conference) stated that, in the face of a $2 million budget deficit, "There's a very real possibility of football going away." (*Id.* ¶ 90.) Similarly, Kent State (an FBS school in the Mid-American Conference) recently commenced "a sweeping look at its athletics program that could include deciding whether any sports should be cut." (*Id.*) And in December 2014, University of Alabama at Birmingham (an FBS school in Conference USA) dropped FBS football altogether, determining that the program was too expensive to be sustainable. (*Id.* ¶ 91.) It therefore simply is not true, and surely cannot be presumed to be true, that all Division I institutions from which putative class members presently receive athletic scholarships are "flush with cash" or would be able to continue funding all student-athlete scholarships at or above current levels if the eligibility rules were eliminated.

The effect of the requested injunctive relief on the financial constraints faced by most Division I institutions would be magnified by Title IX to the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* The Department of Education's Office of Civil Rights has construed Title IX to require proportional equality of athletic financial assistance and other benefits and opportunities to male and female student-athletes. *See generally* 44 Fed. Reg. 71413 (Dec. 11, 1979). If the requested injunctive relief were granted, the requirement that institutions provide proportionally equal scholarships to women athletes would substantially increase the financial pressures faced by Division I schools, likely tipping the balance for some of those schools to withdraw from FBS football or Division I basketball altogether.

Many Division I schools would undoubtedly look for ways to reduce the financial pressures of a completely "free and open" marketplace for student-athlete services without having to withdraw from FBS football or Division I basketball entirely. Plaintiffs' own testimony suggests ways—each of which would harm some putative class members—in which many schools could meet that challenge by reducing the number of scholarship players. Some plaintiffs testified, for instance, [redacted] (*See, e.g.*, Hartman Dep. at 241-43; Jenkins Dep. at 256-57.) They also testified that walk-on players are as talented as some scholarship players. Alec James testified that the University of Wisconsin has "a strong walk-on tradition" with as many as fifty walk-on players on the football team, many of whom get substantial playing time. (James Dep. at 218-19.) [redacted] (*See, e.g.*, Hayes Dep. at 157-64; Jenkins Dep. at 260-64; Bohannon Dep. at 169.) To the extent that schools opt to reduce the number of scholarship athletes on their football and basketball teams in response to the grant of plaintiffs' requested injunction, putative class members who now receive athletic scholarships will be disadvantaged.

Plaintiffs' unsupported assertion that schools could increase student-athlete compensation by reducing the compensation of head coaches is economic nonsense. As an initial matter, head coaches who earn the multi-million dollar salaries on which plaintiffs focus are rare; most Division I head coaches earn far less, and reductions in their salaries would not permit substantial increases in student-athlete financial aid. (Ordover Rep. ¶ 89.) More importantly, coaches are not market substitutes for student-athletes and there is thus no economic basis for assuming that increasing student-athlete compensation would encourage Division I institutions to spend *less* on head coaches. (*Id.* ¶¶ 87-88.) To the contrary, the economic evidence shows that college football and basketball head coaches who are paid significant compensation are likely in the same market as the head coaches of professional football and basketball teams, and their salaries are far more directly affected by the level of compensation for coaches of professional teams than by the level of financial aid for student-athletes. (*Id.*) As plaintiff Alec James testified, student-athletes want coaches who are of the caliber of professional league coaches. (James Dep. at 49-53.) Thus, coaches' salaries

are unlikely to provide an adequate source of revenue with which to increase the athletic scholarships.

Because, in response to the grant of an injunction like the one plaintiffs seek, some Division I schools will likely reduce scholarship levels for many putative class members (and, in some cases, perhaps shutter their programs altogether), the requested injunctive relief would have diverse effects on individual putative class members, harming many. For this additional reason, the proposed representative plaintiffs cannot fairly and adequately protect the interests of the putative classes they seek to represent. Accordingly, their motion for class certification should be denied.

III. CONFLICTS AMONG PUTATIVE CLASS MEMBERS RENDER INJUNCTIVE RELIEF INAPPROPRIATE RESPECTING THE CLASSES AS A WHOLE.

The conflicts that preclude the named plaintiffs from fairly and adequately protecting the interests of absent putative class members also prevent this Court from finding that putative class members possess the common interest necessary to make class-wide injunctive relief appropriate under Rule 23(b)(2). For this independent reason, plaintiffs' motion for class certification should be denied.

To certify a class under Rule 23(b)(2), plaintiffs bear the burden of showing that defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The lower courts have characterized this requirement in terms of cohesiveness and homogeneity: "Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous." *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 580 (7th Cir. 2000). Indeed, "the defining characteristic of [a 23(b)(2) class] is the homogeneity of the interests of the members of the class." *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 649 (6th Cir. 2006). Thus, "cohesiveness is a significant touchstone of a (b)(2) class," *Blackman v. District of Columbia*, 633 F.3d 1088, 1094 (D.C. Cir. 2011), and "assumptions of homogeneity and class cohesiveness . . . underlie (b)(2) certification." *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 202 (D.D.C. 2013) (alterations in original, citation omitted). In short, "a Rule 23(b)(2) class cannot be certified unless it is cohesive." *Zehel-Miller v. Astrazenaca*

Pharm., LP, 223 F.R.D. 659, 664 (M.D. Fla. 2004); *accord Herskowitz v. Apple, Inc.*, 301 F.R.D. 460, 481 (N.D. Cal. 2014) (denying class certification for lack of "cohesiveness").

"Intra-class conflicts . . . demonstrate that certifying the class under (b)(2) would be inappropriate because of the lack of cohesiveness of the class." *Richardson*, 991 F. Supp. 2d at 203; *accord In re Managerial, Prof'l & Technical Emps. Antitrust Litig.*, No. 02-CV-2924, 2006 WL 38937, at *9 (D.N.J. Jan. 5, 2006) (declining to certify a 23(b)(2) class on cohesion grounds when "enjoining [defendants'] conduct would not provide relief generally applicable to the class because it would have potentially conflicting effects on different members").[10] The conflicts among putative class members render certification under Rule 23(b)(2) inappropriate here. Where, as explained above, many absent class members are actually *benefited* by the challenged rules, all putative class members do not have a common interest in seeking the invalidation of those rules. To the contrary, the interests of those putative class members who are benefited by the challenged rules align with the interests of *defendants* in preserving those rules. Accordingly, the named plaintiffs cannot prove that their putative classes are cohesive or that the injunctive relief they seek is "appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). For this independent reason, the motion for class certification should be denied.

In addition, some courts, including district courts within this circuit, have determined that putative classes lack cohesiveness, and therefore are not certifiable under Rule 23(b)(2), when individual issues predominate. *See, e.g.*, *Sweet v. Pfizer*, 232 F.R.D. 360, 374 (C.D. Cal. 2005) ("even though Rule 23(b)(2), unlike Rule 23(b)(3), does not specifically contain predominance and superiority requirements, a class under Rule 23(b)(2) must not be overrun with individual issues");

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[10] The Ninth Circuit decisions in *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998), and *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010), are not to the contrary. Those cases stand for the proposition that all putative class members need not be injured or injured in the same way by the challenged conduct for certification under Rule 23(b)(2) to be appropriate. But they do not contradict the well-established principle that a putative class may not be certified if some members of the putative class are in fact benefited by the challenged conduct and would actually be harmed by the proposed injunction. Given the manifest intra-class conflicts here, this case presents no occasion for this Court to address whether *Walters* and *Rodriguez* are consistent with the Supreme Court's more recent statement in *Wal-Mart* that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." 131 S. Ct. at 2557.

Lewallen v. Medtronic USA, Inc., No. C 01-20395, 2002 WL 31300899, at *3 (N.D. Cal. Aug. 28, 2002) ("Even though [Rule 23(b)(2)] does not contain a predominance and superiority requirement, the requisite cohesiveness is lacking where individual issues predominate."). The Third Circuit, where the *Jenkins* action originated and whose law merits "close consideration" on this motion,[11] likewise has recently held that "'disparate factual circumstances of class members' may prevent a class from being cohesive and, therefore, make the class unable to be certified under Rule 23(b)(2)." *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011) (citation omitted). Here, where individualized inquiry would be necessary to determine which class members are benefited by the existing rules and thus would be harmed by the requested injunction, the putative classes are not cohesive, and cannot be certified under Rule 23(b)(2).

IV. NONE OF THE CONSOLIDATED PLAINTIFFS HAS STANDING TO PURSUE THE INJUNCTIVE RELIEF THEY SEEK AND THEIR MOTION FOR CLASS CERTIFICATION SHOULD BE DENIED.

Finally, although the CAC plaintiffs proffered Chris Stone, John Bohannon, Chris Davenport and Justine Hartman as named plaintiffs to represent the three putative classes asserted in the consolidated amended complaint (Pl. Br. at 12-13), over the course of discovery, Messrs. Stone and Davenport both withdrew as injunctive class representatives, leaving Ms. Hartman and Mr. Bohannon—both basketball players—as the sole named plaintiffs seeking to represent the three putative CAC injunctive relief classes. As a result, the CAC plaintiffs no longer have a proposed representative for their putative FBS football class. Moreover, [redacted] (Hartman Dep. at 246; Bohannon Dep. at 8, 22; Pl. Br. at 12-13), and accordingly neither has standing to sue for injunctive relief at all. *See, e.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986, 988 (9th Cir. 2011) (holding former Costco employees did not have standing and were not adequate representatives to pursue injunctive relief);

[11] *See, e.g.*, *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 911 n.17 (6th Cir. 2003) (law of a transferor forum merits "close consideration" in MDL actions) (citing *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987)).

Funeral Consumers Alliance, Inc. v. Service Corp. Int'l, 695 F.3d 330, 342-43 (5th Cir. 2012) (named plaintiffs who are not threatened with injury lack standing to seek injunctive relief).[12]

The failure of the CAC plaintiffs to proffer a proposed class representative with standing to seek injunctive relief precludes this Court from certifying an injunctive relief class against six of the smaller conference defendants. As previously noted, the American Athletic Conference, Conference USA, Inc., the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, and the Western Athletic Conference are named as defendants only in the consolidated amended complaint. (CAC ¶¶ 169-82.) They have not been named as defendants in the *Jenkins* complaint, the only complaint in which a proposed representative plaintiff continues to have standing to seek injunctive relief. In short, absent a class representative with standing to seek injunctive relief, no injunctive relief class may be certified with respect to these six conferences.

Plaintiffs cannot cure that defect now. The CAC plaintiffs have stipulated, and this Court ordered, that plaintiffs would not proffer any additional student-athletes as class representatives on this motion after February 20, 2015.[13] Accordingly, there are no proposed representative plaintiffs with standing to seek injunctive relief on behalf of the putative CAC classes, and the motion to certify those classes should be denied on this independent basis.

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[12] To the extent that plaintiffs' putative classes include absent class members who, like Ms. Hartman and Mr. Bohannon, are no longer eligible to play college sports and thus lack standing to pursue injunctive relief, those putative classes suffer from an additional infirmity. As the Ninth Circuit recently held, "[n]o class may be certified that contains members lacking Article III standing." *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)); *see also In re Deepwater Horizon*, 753 F.3d 509, 513 n.1 (5th Cir. 2014) (same). Before this Court may certify plaintiffs' putative classes, therefore, it must be satisfied that "each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013).

[13] Stipulation and [Proposed] Order Permitting Substitution of Plaintiffs and Resetting Schedule for Injunctive relief Class Certification, No. 4:14-md-2541 (Feb. 13, 2015) (Dkt. No. 193), at 2; Order granting Stipulation entered by Hon. Claudia Wilken (Feb. 13, 2015) (Dkt. No. 195).

Conclusion

For the foregoing reasons, plaintiffs' motion for class certification should be denied.

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FILER'S ATTESTATION

I, Jeffrey A. Mishkin, am the ECF user whose identification and password are being used to file DEFENDANTS' OPPOSITION TO PLAINTIFFS' AMENDED JOINT MOTION FOR CLASS CERTIFICATION. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Jeffrey A. Mishkin

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2015, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

/s/ Jeffrey A. Mishkin